

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>SUKHWINDER SINGH</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 830167</b>
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax	:	
Law for the Period September 1, 2015 through May 31,	:	
2018.	:	

---

Petitioner, Sukhwinder Singh, filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period September 1, 2015 through May 31, 2018.

A hearing was held before Nicholas A. Behuniak, Administrative Law Judge, in Brooklyn, New York, on November 29, 2022, with the final brief to be submitted by April 27, 2023, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel).

***ISSUES***

I. Whether the Division of Taxation appropriately assessed penalties pursuant to Tax Law § 1145 (k) against petitioner for the failure to present and make electronic records available and accessible in an electronic format.

II. Whether petitioner has met his burden of proof warranting cancellation of the penalties imposed under Tax Law § 1145 (k).

### ***FINDINGS OF FACT***

The Division of Taxation (Division) submitted unnumbered proposed findings of fact in a narrative format as part of its brief. Given the manner in which such proposed findings of fact were presented, it is not possible to make ruling on such (*see* State Administrative Procedure Act § 307 [1]); however, the relevant and appropriately supported portions of the Division's proposed findings of fact have been incorporated herein.

Petitioner, Sukhwinder Singh, did not submit any proposed findings of fact.

1. Petitioner concedes that he was a responsible officer of the liquor store, Babu Wine and Liquor, Inc. (Babu), for the period at issue, September 1, 2015 through May 31, 2018.

2. The Division conducted a sales and use tax audit of Babu for the period at issue. The Division had previously conducted a sales and use tax audit of Babu for periods preceding the period at issue (prior audit). During the prior audit, the Division found that Babu failed to maintain appropriate books and records and was therefore assessed additional tax by the Division. Babu agreed with the Division's assessment of additional tax and represented that it would thereafter use an electronic point of sale (POS) system to account for the business going forward. Apparently, as a result of this representation, the Division did not assess Babu penalties for the prior audit.

3. The Division sent Babu an appointment letter, dated June 21, 2018, informing Babu of the audit for the current period at issue requesting that Babu make its relevant books and records available to the Division. Attached to the appointment letter was an information document request (IDR No. 1), that specified a detailed listing of records that were to be available for the entire period at issue, including: sales tax returns; worksheets and cancelled checks; federal income tax returns; general ledger; general journal and closing entries; sales invoices; all

exemption documents supporting nontaxable sales; chart of accounts; fixed asset purchase and sales invoices; expense purchase invoices; merchandise purchase invoices; bank statements, canceled checks and deposit slips; cash receipts journal; cash disbursements journal; the corporate book, including minutes, board of directors, and articles of incorporation; depreciation schedules; lease contracts; State Liquor Authority licenses; utility bills; guest checks; and cash register tapes. In response to IDR No. 1, Babu provided its federal income tax returns, a limited number of merchandise purchase invoices, bank statements and utility bills, but otherwise failed to provide the information requested.

4. During the audit, a representative for Babu indicated that Babu's sales tax returns were completed based upon its bank statements. During the audit, Babu's representative informed the Division that the POS system was damaged due to flooding. The Division informed Babu's representative that Babu should hold onto the POS system hardware so that the Division could attempt to conduct a "POS extraction" whereby the Division would attempt to obtain necessary sales information from the damaged POS system hardware. Babu agreed to such an arrangement.

5. On November 15, 2018, the Division sent Babu a second IDR (IDR No. 2) requesting the same documentation requested in IDR No. 1 that had not been provided to the Division. In response to IDR No. 2, Babu indicated that additional documentation would be forthcoming to the Division; however, no additional documentation was provided at that time.

6. On February 12, 2019, the Division sent Babu a third IDR (IDR No. 3) requesting the same documentation requested in IDR No. 1 and IDR No. 2 that had not been provided to the Division. In addition, on February 12, 2019, the Division sent Babu a penalty intent letter

explaining that the records provided were inadequate and the Division was allowing Babu an additional 30 days to provide the requested records or penalties would be imposed.

7. On March 21, 2019, the Division sent Babu a statement of proposed audit change, form AU-346, indicating that an assessment of \$106,000.00 in penalties for the failure to maintain and provide proper books and records would be forthcoming. The \$106,000.00 represented penalties assessed of \$10,000.00 for each quarter in the period at issue, except for the first quarter in which the penalties assessed were \$6,000.00.

8. On April 30, 2019, Babu informed the Division that it did have the POS system functioning and would be providing the requested information.

9. On May 14, 2019, Babu presented the Division with reports from its POS system (POS summary reports) that only provided the gross total quarterly sales, exempt sales, taxable sales, tax collected and total number of transactions for the quarters ending November 2015, February 2016 and May 2016.

10. On June 11, 2019, the Division sent Babu a second form AU-346 indicating that an assessment of \$106,000.00 in penalties for the failure to maintain proper books and records would be forthcoming.

11. Since no additional records were provided by Babu, on June 28, 2019, the Division issued notice of determination number L-050141457, assessing Babu civil penalties of \$106,000.00 for the failure to maintain proper books and records. In addition, on June 28, 2019, the Division issued notice of determination number L-050144798, assessing petitioner civil penalties of \$106,000.00 as a responsible person of Babu.<sup>1</sup>

---

<sup>1</sup> The Division separately assessed additional sales tax, penalties and interest against Babu, and petitioner as a responsible person, for the periods at issue. Such assessments are not at issue in this case since they were not part of the petition for this matter.

12. Although not discussed by the Division, the audit records in evidence indicate that on September 12, 2019, Babu provided the Division additional POS summary reports for the quarters ended August 2016, November of 2016, February 2017, May 2017, August 2017, November 2017, February 2018 and May 2018.

13. Petitioner requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) for notice of determination number L-050144798. By order dated October 30, 2020 (CMS No. 000314401), notice of determination number L-050144798 was sustained by BCMS.

14. On December 3, 2020, petitioner filed a petition challenging CMS No. 000314401.<sup>2</sup>

15. At the hearing, Althea Alexander, sales tax auditor, testified for the Division and discussed the audit. Kuldkip Madan, an accountant, testified for petitioner. Mr. Madan testified that a flood had damaged Babu's POS system but that it had been repaired. Petitioner did not discuss or explain what happened to Babu's other records including Babu's purchase and sales invoices and receipts, general ledgers or cash register tapes.

16. The Division was not given access to Babu's POS system and never received any of Babu's purchase and sales invoices or receipts, general ledgers, or cash register tapes.

17. On July 18, 2022, the Division filed a notice of motion, and supporting documentation, seeking an order from the Division of Tax Appeals dismissing the petition or for summary determination in its favor for "Notice of Determination L-051187793." The notice of

---

<sup>2</sup> The petition expressly identified CMS No. 000314401 and notice of determination number L-050144798 as the "notice/assessment ID number(s) being challenged." As required, the petition included a copy of CMS No. 000314401 (*see* 20 NYCRR 3000.3 [b] [8]). In the tax determination section of the petition, petitioner referred to "L-050141457-6 and L-051179494-3." The petition also included what appears to be a copy of page 2 of a notice and demand for assessment number L-051179494. The Division of Tax Appeals is without jurisdiction to provide a hearing on a notice and demand (*see* Tax Law § 173-a [3] [c]). No statutory notice was ever offered for an assessment designated by number L-050141457 and thus the Division of Tax Appeals lacks jurisdiction over such (*see* Tax Law § 2008 [1]).

motion's caption refers to petitioner and the applicable DTA number for this case. The undersigned indicated that the motion would be ruled on in due course with the determination for this case.

18. Notice of determination number L-051187793 was not referred to or challenged in the petition. Notwithstanding this fact, at the hearing, the Division refused to withdraw the motion. In its post hearing brief for this case, the Division now asserts that the Division of Tax Appeals does not have jurisdiction over notice of determination L-051187793 because such statutory notice was never petitioned in this case; however, the Division did not withdraw its motion.

### ***CONCLUSIONS OF LAW***

A. Petitioner bears the burden of proof to overcome the presumed correctness of the Division's assessment (*see Matter of Mera v Tax Appeals Trib.*, 204 AD2d 818 [3d Dept 1994]; *see also Matter of Blodnick v New York State Tax Commn.*, 124 AD2d 437 [3d Dept 1986], *appeal dismissed* 69 NY2d 822 [1987]).

B. Tax Law § 1135 (a) (1) provides that:

“[e]very person required to collect tax shall keep records of every sale ... and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the commissioner of taxation and finance may by regulation require. Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately.”

The sales records required to be maintained include, among other things, sales slips, invoices, receipts, statements or other memoranda of sale, guest checks, cash register tapes and any other original sales documents (20 NYCRR 533.2 [b] [1]).

C. The Division asserted penalties pursuant to Tax Law §§ 1145 (i) and (k). Tax Law § 1145 (i) provides in relevant part:

“Any person required to make or maintain records under this article (but not including the records required under section eleven hundred forty-two-A of this part) who fails to make or maintain or make available to the commissioner these records is subject to a penalty not to exceed one thousand dollars for the first quarter or part thereof for which the failure occurs and not to exceed five thousand dollars for each additional quarterly period or part thereof for which the failure occurs. This penalty is in addition to any other penalty provided for in this article but may not be imposed and collected more than once for failures for the same quarterly period or part thereof. If the commissioner determines that a failure to make or maintain or make available records in any quarter was entirely due to reasonable cause and not to willful neglect, the commissioner must remit the penalty imposed for that quarter” (Tax Law § 1145 [i]).

Tax Law § 1145 (k) provides in relevant part:

“Any person who, having elected to maintain in an electronic format any portion or all of the records he or she is required to make and maintain by this article, fails to present and make these records available and accessible to the commissioner in electronic format, is subject to a penalty not to exceed five thousand dollars for each quarterly period or part thereof for which these electronic records are not presented and made available and accessible upon request, notwithstanding that the records may also be maintained and available in hard copy format. This penalty is in addition to any other penalty provided for in this article, but may not be imposed and collected more than once for a failure for the same quarterly period or part thereof. Provided, however, nothing in this subdivision will prevent the separate imposition, if applicable, of any penalty imposed by subdivision (i) or (j) of this section for the same quarterly period or part thereof.

If the commissioner determines that the failure to present and make electronically maintained records available and accessible for a quarterly period was entirely due to reasonable cause and not to willful neglect, the commissioner must remit the penalty imposed for that quarter. . . For purposes of the penalty imposed by this subdivision, a failure to present and make available and accessible a record maintained in electronic format includes not only the denial of access to the requested records that were maintained electronically, but also the failure to make available to the commissioner the information, knowledge, or means necessary to access and otherwise use the electronically maintained records in the inspection and examination of these records” (Tax Law § 1145 [k]).

In the case at hand, Babu failed to maintain the documentation required under the Tax Law or to provide an explanation as to the whereabouts of such documentation. Moreover, Babu had implemented an electronic POS system. Babu’s POS system was damaged by flooding; however, Babu failed to provide the Division access to the hardware of the POS system to enable

the Division to attempt to retrieve the information itself. Furthermore, petitioner's witness testified that Babu's POS system had subsequently been repaired. Nevertheless, the Division was not provided access to the system. The POS summary statements, which only list the gross amounts of quarterly information, are not a substitute for access to the POS system itself or what is required to be maintained as books and records for a business. Accordingly, the Division's assessment of penalties pursuant to Tax Law §§ 1145 (i) and (k) was appropriate.

D. As noted, the penalties assessed pursuant to Tax Law §§ 1145 (i) and (k) may be abated upon a showing of reasonable cause and an absence of willful neglect. Petitioner bears the burden of establishing reasonable cause as well as the absence of willful neglect (*see Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). This is a difficult burden because “[b]y first requiring the imposition of penalties (rather than merely allowing them at the Commissioner’s discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citation omitted]” (*see Matter of Laham*, Tax Appeals Tribunal, October 27, 2016, citing *Matter of MCI Telecoms. Corp.*, Tax Appeals Tribunal, January 16, 1992, *confirmed* 193 AD2d 978 [3 Dept 1993]).

Petitioner has not established reasonable cause for abatement of penalties in the present matter. Although losing electronic records due to flooding may be a circumstance warranting the abatement of penalties, Babu's failure to provide the Division access to the damaged POS system was unexplained and inappropriate. Moreover, even after the POS system was repaired, Babu failed to provide the Division access to the system or appropriate records from the system. Such actions are indicative of a willfulness to thwart the requirements of the Tax Law. Under such circumstances, the waiver of penalties is not justified.

E. The Division of Tax Appeals is a body of limited jurisdiction, and such is limited to statutory notices properly challenged by the petitioner in a petition (*see* Tax Law § 2008 [1]). The Division's motion in this case attempts to address notice of determination number L-051187793. Notice of determination number L-051187793 was not referenced or included in the petition for this matter. Therefore, the Division's motion, dated July 18, 2022, is denied.

F. The petition of Sukhwinder Singh is denied, and the notice of determination number L-050144798, dated June 28, 2019, is sustained.

DATED: Albany, New York  
October 19, 2023

/s/ Nicholas A. Behuniak  
ADMINISTRATIVE LAW JUDGE